Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER, MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN, DAVE TIGER and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

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This brief amicus is filed by the American Civil Liberties Union pursuant to consent of the parties.

The Union is a nation-wide, non-political organization, whose members are persons interested in preserving the fundamental rights guaranteed to individuals by the Constitution and Bill of Rights. It attempts to intervene in litigation involving threats to our basic freedoms, irrespective of whether those immediately threatened are Communists, Fascists, or persons embracing other hated ideologies. For the history of freedom teaches the Union that a menace to the freedom of any person, no matter who he is or what he believes or stands for, independent

of how detestable he or his views may be, jeopardizes the freedom of all of us.

As a champion of civil liberties the Union is opposed to any governmental, political or economic system which denies fundamental civil liberties and human rights. It is therefore opposed to any form of the police state or the single-party state, or any movement in support of them. In opposing such dictatorial, totalitarian systems, the Union takes no position on their economic, social or political practices or policies not affecting civil liberties.

For almost thirty years, the American Civil Liberties Union through its Committee on Academic Freedom has been active in the defense of the civil liberties and academic freedom of teachers, students and educational institutions wherever infractions have arisen. In such cases, it tries to speak for the public interest in intellectual freedom.

The Amicus believes that the democratic American answer to totalitarianism, the Communistic type or otherwise, does not lie in the abridgment of any traditional liberties. Such abridgment is logical only in a police state, as Russia is, and as Nazi Germany and Fascist Italy were before they fell, but it is alien to democratic America. Therefore, Americans must be continually alert that in meeting the challenge of Communism or of any other threat to democracy, Americans do not resort to authoritarian methods and measures, for the adoption of such practices would constitute by themselves a defeat for American democracy and a victory for our totalitarian enemies.

It believes that the tragedy of the Feinberg Law is that it plays into the hands of the very persons against whom it is directed, the Communists. Undoubtedly it is part of the Communist strategy to frighten us into abandoning instead of advancing our democracy. By enacting the Feinberg Law, we are adopting the work and techniques of

the anti-democrats, aping the type of actions we oppose. (See, Statement by President James B. Conant of Harvard University before the Joint Committee on Education of the Massachusetts Legislature at a hearing on February 9, 1948 on a bill to prohibit employment of Communists as teachers.) It is undoubtedly for this reason that the Feinberg Law has been opposed by numerous persons and organizations including Professor Sidney Hook, John Dewey, the United Parents Association, the New York Times, the New York Herald-Tribune.

Underlying the Feinberg Law and its loyalty reports provision, is the regrettable circumstance that fear of Communism is driving sincere-minded Americans to confuse any desire for, or any interest in, political, social or economic changes with subversive activity, and to consider anyone, particularly a teacher, advocating or examining such changes or ideas, to be in all probability a Communist or fellow-traveler. The implications of this erroneous thinking are catastrophic. It creates an atmosphere favorable to Communism. It identifies Russia with social change, while it arbitrarily limits us to the *status quo*. It concedes the Communist claim of concern over the underprivileged, while it negates the substantial achievements and promise of American democracy in their behalf. It gives the Communists, in short, an undeserved propaganda victory over us.

Because of these beliefs, the Union sought consent to intervene here. The Amicus is concerned over the Feinberg Law and the rules and regulations promulgated thereunder, because on their face and in their inevitable effect, they threaten to impair democratic education and to stifle free thought and its unfettered communication in the public schools of New York State, and through emulation by other states, in the public schools throughout the country.

The Statutes Involved

This case involves a constitutional challenge of the Feinberg Law, Chapter 360 of the Laws of 1949 of New York, which enacted Education Law Section 3022.

The Feinberg Law supplements and implements two antecedent statutes. One, Education Law Section 3021, enacted in 1947, provides for removal of a public school employee for uttering any treasonable or seditious word or doing any treasonable or seditious act. The other prior statute, Civil Service Law, Section 12-a, added in 1939, bars employment in the public schools to any person who advocates, advises or teaches the overthrow of the government by any unlawful means or who organizes or becomes a member of a group teaching or advocating such a doctrine.

The Feinberg Law contains a legislative finding, or "common report," that members of subversive groups, particularly of the Communist party and its affiliated organizations, have "infiltrated" into the public schools, despite existing laws. The results are "that subversive propaganda can be disseminated among children of tender years by those who teach them"; said teachers are frequently bound "to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry"; the dissemination of their "propaganda may be and frequently is sufficiently subtle to escape detection in the classroom." To protect children from "such subversive influence" it is essential that the laws "prohibiting persons who are members of subversive groups" from employment in the public schools "be rigorously enforced." The state board of regents are therefore admonished "to take affirmative action to meet this grave menace and to report thereon regularly" to the state

legislature. The regents are instructed to adopt and enforce rules and regulations for the disqualification or removal of school superintendents, teachers or employees who violate the two antecedent statutes or the Feinberg Law. The regents are directed "after inquiry and after such notice and hearing as may be appropriate" to make a listing of "subversive" organizations. "Membership in any such organization * * * shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state."

The rules adopted by the regents for implementing the law provide that prior to the hiring of a school employee, inquiry shall be made of such "persons as may be in a position to furnish pertinent information" whether he "is known to have violated the aforesaid statutory provisions". Loyalty reports on each employee are required of school authorities, who are to institute removal proceedings "in those cases in which in their judgment the evidence indicates violation of the statutory provisions". Evidence of membership in any organization ten days after listing by the regents as "subversive" shall "constitute *prima facie* evidence" of disqualification for employment.

The memorandum of the Commissioner of Education on the administration of the regents' rules declares that these rules "provide systematic procedures for identifying and removing from the school system disloyal" employees. It further provides that in preparing loyalty reports, reporting "officials will of course use their own acquaintance with the teachers * * * as an immediate guide"; if "well acquainted" with the teachers on whom they are reporting "they will already be in possession of pertinent facts either to substantiate their judgment of a teacher's loyalty" or "to indicate the need for further evidence".

"Subversive activity" is "treasonable" or "subversive" action inside or outside the classroom or school, not limited to word of mouth. It may be the "writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed by others".

School authorities are advised that "teachers who are honestly concerned to help their pupils to become constructive citizens are likely to raise many questions and make many suggestions about possible improvements in the American form of government and American institutions, which can not in any just sense be construed as subversive. Especially, if these teachers are teachers of history, civics or government, they are likely also to bring to their pupils' attention materials dealing with foreign peoples and foreign governments (including the people and government of Russia)". Teachers, as citizens, "may raise questions and make suggestions outside their classrooms, about improvements in our form of government" and "quite legitimately inform themselves fully, and enter into discussions with other people, about forms of government different from our own".

Scope of the Argument

The Amicus considers the Feinberg Law and its implementary rules and guides from the point of view of their effect upon civil liberties and academic freedom within the public schools, particularly in regard to their effect upon teachers, students and the public school system, and specifically upon teachers, who are the principal subjects of the Feinberg Law and the administrative provisions thereunder.

ARGUMENT

POINT I

The Feinberg Law and its related rules and regulations and memorandum abridge fundamental personal freedoms guaranteed by the Constitution of the United States and the Bill of Rights.

The vice of the Feinberg Law is that it unleashes a continuous series of successive annual invasions of fundamental rights. It curtails freedom of thought, speech and association, amounts to a bill of attainder and an ex post facto law, and establishes unfair procedures for determining individual guilt. The law is also arbitrary, incapable of objective application because it is vague and uncertain, and creates unreasonable presumptions of guilt.

It is our belief that whether a teacher should be permitted to teach in the public schools does not depend on his ideologies and associations, but upon the integrity of his work within and without the class-room, inside the public school system. The critical question to us is whether the teacher has made the classroom a platform for indoctrination of anti-democratic or non-democratic ideas, or the public school a place for propagandizing alien ideologies. If he has, he has abused and misused his position and consequently is unfit to teach. A teacher who presents to his students purported facts and values distorted to conform to Communist Party doctrine or to any other dogma, or who perverts his position within the public school system to foster in the students' minds his undemocratic ideas or to proselytize for undemocratic ideologies is not a teacher but a propaganda agent and therefore is

guilty of misconduct. He should be disciplined, whether a Communist, Fascist, or otherwise.

In determining whether a teacher is guilty of misconduct, as just defined, even if he is a Communist, he still is entitled to all the basic personal protections of freedom of speech, thought and association, guaranteed everybody by the Constitution and the Bill of Rights. This means in concrete terms that a person may not be disqualified or discharged as a teacher from the public school system unless certain principles are observed, namely: his case must be judged separately on its own facts and in terms of deeds, not mere beliefs or associations; his guilt must be personal and cannot arise from association with an organization that is legal during the association. His guilt may not be attributed to the holding of an opinion or a view on politics, economics, religion or some other subject, or even to intent in the absence of an overt act. *De Jonge* v. *Oregon*, 299 U. S. 353; *Schneiderman* v. *United States*, 320 U. S. 118.

The Feinberg Law is a departure from the foregoing principles. The danger inherent in permitting any breach of these elementary democratic ideas was dramatically illustrated recently within the State of New Mexico, where a vicious anti-Catholic movement assumed the shape of a move to disqualify members of Catholic religious orders from teaching in the state public schools. We, as Amicus, vigorously opposed this measure, and were upheld by the New Mexico Supreme Court. *Zellers* v. *Huff*, —— N. M. —— , No. 5332, Sept. 20, 1951. (See, Brief of American Civil Liberties Union, *Amicus Curiae*, Point I; see *New Leader*, October 8, 1951, pp. 6-8).

This case does not involve the right of the State of New York to determine who shall teach its children, which

right is conceded here. The law undertakes to disqualify certain persons from employment as teachers within the public school system by tests which bear no necessary relationship to the advancement of the public welfare in that they are not standards connected with fitness to teach. These tests are, in fact, in adverse relationship to the public interest, by their inevitable tendency to disrupt the public schools, intimidate the teaching profession, lower the quality of learning, and stifle democratic education. Therefore, to disqualify persons from teaching under such tests is to flout due process. *People* v. *Crane*, 214 N. Y. 154 (1915), states the rule in these cogent words:

> "* * * we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state * * *. We do not hold that it may discriminate among its citizens on the ground of faith or color * * *. For like reasons we assume that he may not be disqualified because of faith or color from serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared *disqualified* from service, unless the proscription bears some relation to the advancement of the public welfare." (at 167)

The Feinberg Law assumes that the New York public schools are honeycombed with Communists and fellow-travellers. This assumption is made by the statute on "common report." This "report" is at odds, however, with the available facts, which indicate that Communist teachers do not constitute a "present danger" to the people of New York State. Dr. William Jansen, the New York City Super-

intendent of Schools, publicly testified in September 1949 that there were very few Communists in the public schools (New York Times, September 29, 1949, p. 1). It is not likely that the number has increased or stayed the same since then as the lessons of events have continued to define the intellectual and moral dishonesty of Communism, its political insincerity and opportunism, its economic and social shortcomings, its religious repressions. Nor is there any reason to believe that the public schools within the state, outside of New York City, are over-run with Communists. The Communist Party and its ideology never have made appreciable headway in America. The genius of our people, rooted in deep respect for the dignity of the individual, has barred in this country the growth of any totalitarian philosophy. It is a fair suspicion that we tend to exaggerate the importance and strength of a group which has failed to capture any appreciable following in this country and which, as Budenz and other ex-Communists have disclosed, loses many members and sympathizers over the course of the years. (See, Schlesinger, What About Communism, Public Affairs Pamphlet No. 164, p. 27.) Should Communists ever become a real threat here, appropriate timely counter-action undoubtedly would be taken by our government. The Federal Bureau of Investigation most certainly seems alerted to every step and movement of the Party and its cohorts. None of the decisive factors obtain in America which permitted the success abroad of Communistic fifth column activities and government coup d'etats. Finally, there is no doubt of the ability of the school system to take appropriate and timely action in the event the few Communist teachers were to undertake subversive activity within the school system at the command of the Party at some future date. The school system is not a loose,

amorphous group but a centralized and organized body whose vigilant and expert supervisors and administrators are constantly aware of the activity within the schools and fully empowered to take effective and seasonable steps upon a modicum of evidence pointing to improper action. (Cf. *American Communications Association* v. *Douds*, 339 U. S. 382.)

Few Communists are due to be eliminated, even though the Commissioner describes the regents rules as providing "systematic procedures for identifying and removing from the School System disloyal" persons. Communists are old hands at evasion and subterfuge. (On the difficulty of identifying Communists, see *Report of the Sub-Committee of the Joint Legislative Committee to Investigate Procedures and Methods of Allocating State Moneys for Public School Purposes and Subversive Activities*, Leg. Doc. (1942) No. 49, p. 13.) Many victims of the screenings are likely to be liberals, progressives and others who express deviant or unpopular views or ideas. Theirs are apt to be the dangerous heresies and unorthodoxies exposed and punished, at the expense of curtailed opportunity for developing youths capable of becoming discriminating adults. It is to be noted, moreover, that the application of the Feinberg Law carries with it the danger that students may grow accustomed to spying, censorship, suppression and the fear of speaking freely and independently as normal in a democracy. This would be a disaster for the American way of life which depends for its preservation on the public school as a training ground for young Americans devoted to democratic principles.

We are afraid that the mischief which will flow from the Feinberg Law is greater than the gravity of the evil we face in adhering to traditional democratic principles

and in continuing to judge all persons, even Communists, on their deeds and actions, not on their anticipated conduct alone. The law makes a shambles of the principle of freedom. It is no answer to assert that the unfettered preservation of all our liberties is a subordinate consideration to the need for rooting out Communists. The American conception of civil liberties, as Mr. Justice Holmes emphasized, is that the test of its validity is its functioning in times of crisis and its application to unpopular people, not in its utilization only in ordinary times or cases. (See, *Abrams* v. *United States*, 250 U. S. 616, 624 at 630 (1919), Holmes, J., dissenting.)

We do not overlook the intimation of the Court below that the constitutional rights of freedom of intellect and of association of a teacher may be abridged as a condition of his employment in the public schools. This view rests of course upon the old dictum of Mr. Justice Holmes in *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220, and the decision in *United Public Workers* v. *Mitchell*, 330 U. S. 75. Neither case, however, is in point here, since neither dealt with expression of opinion or the right of association. Both were concerned with partisan political activities and on their facts clearly are irrelevant. Moreover, in *United States* v. *Thayer*, 209 U. S. 39, Mr. Justice Holmes himself indicated that his earlier statement in the *McAuliffe* case was not intended to be taken literally, for he pointed out that even office-holders might have constitutional rights, which the legislature could not restrict (209 U. S. at 42). And in the *Mitchell* case, the majority opinion recognized that government employees could not be deprived of their freedoms, outside the area of partisan political activity, nor disqualified merely for membership in a political party.

And, in *Garner* v. *Los Angeles*, 341 U. S. 716, 725, Mr. Justice Frankfurter indicated that there are limitations to state activity conditioning public employment:

> "The Constitution does not guarantee public employment, * * *".
>
> "But it does not at all follow that because the Constitution does not guarantee a right to public employment, a city or State may resort to any scheme for keeping people out of such employment. Law cannot reach every discrimination in practice. But doubtless unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge. Surely, a government could not exclude from public employment members of a minority group merely because they are odious to the majority; nor restrict such employment, say, to native-born citizens. To describe public employment as a privilege does not meet the problem."

The Feinberg Law and its implementary rules completely disregard the fact that teachers in their capacity of citizens have the same rights of free expression as others who are not teachers, and that the state may not restrict the enjoyment of these rights by prying into the private lives of teachers. By becoming a teacher a person is not deemed to have sacrificed any of his rights as a citizen. He does not relinquish the liberty to be as free as any other person to participate, in his private capacity, in political, economic or religous movements, or other lawful activities, and to hold and express publicly, outside the school system, his views or ideas concerning politics, economics, international affairs, religion, or anything else. This is not a qualified privilege which may be revoked if certain conditions are not fulfilled. It is fundamental in a democracy that teachers have the right to speak and write as men of independence, and that students have the

right to be taught by men of independent mind. The Feinberg Law is deaf to the clamor of these rights.

Nor is it an answer, we think, to say merely that a Communist, or a person in sympathy with Communism, is necessarily incompetent to be a teacher since he is not in a position to teach the truth and pursue free inquiry, inasmuch as he is subject to a rigid and ruthless discipline. Ignoring whether in a democracy there is *a* truth we desire our teachers to teach and our young to learn, it is to be noted that the assumption that a Communist teacher necessarily will not pursue truth and free inquiry does not square with the logic of experience, however much it seems compelling in theory. The premise was belied in the cases of several of the University of Washington professors tried on their Communist beliefs and associations (*Report of University of Washington Committee on Tenure and Academic Freedom to President Raymond B. Allen*, January 7, 1949). In the case of the eight public school teachers recently tried in New York City before Trial Examiner Theodore Kiendl, the record showed cumulatively 162 years of teaching service in the public school system, or an average tenure of twenty and one-quarter years, without any proof of incompetence or indoctrinating practice on their part. The teaching records of none of the eight, as teachers, were challenged; none were charged with or shown to have rendered unsatisfactory performance of their duties, or to have attempted indoctrination of their students, or with teaching of the Communist Party line, dogma or doctrine, or with disregard of truth or free inquiry. (Record in *In the Matter of the trial of the charges preferred by Dr. William Jansen, Superintendent of Schools*, against *Miss Alice B. Citron, et al.*, before the Board of Education of the City of New York, October, 1950.) Both the University of

Washington and the New York City Board of Education trials tend to show there is no indissoluble link between a teacher's dogmas and associations, on the one hand, even if he is a Communist, and the actual rendition of his teaching functions, on the other. Dogmatists are not likely to be the richest contributors to our intellectual progress, but there are unfortunately many dogmatists in our society and some undoubtedly teach in the public schools. A search for teachers removable upon any such criterion might conceivably embrace many public school teachers who are not Communists. The only workable test of a teacher's efficiency must be his record inside the classroom and within the school system; it cannot rest only on membership in the Communist Party. The test imposed by the Feinberg Law is not dogmatism but "subversiveness"; and the statute with its vague standards will definitely strike at unorthodox thinking while dogmatists will be caught only tangentially, if at all.

1. The law and its administrative rules and memorandum unreasonably invade the spirit of free intellect which the First Amendment reserves from all official control.

Because freedom of thought is a "preferred" freedom, the customary presumption of constitutionality does not attach to a law challenged for abridging this fundamental right. *Thomas* v. *Collins*, 323 U. S. 516, 529-30 (1945); *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940); *Schneider* v. *State*, 308 U. S. 147, 161 (1939); *Murdock* v. *Penn.*, 319 U. S. 105, 115 (1943). The inference drawn is against the propriety of legislative intrusion into this domain. It is a realm free from official control except in the case of a public emergency.

The Feinberg Law is not an emergency measure; it is not required by "clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas* v. *Collins*, 323 U. S., at 530. Limitations on freedom of thought are constitutional only where the substantive evil is extremely serious (*Bridges* v. *California*, 314 U. S. 252, 263). In such case, the legislation must be "narrowly drawn to prevent the supposed evil." *Cantwell* v. *State of Conn.*, 310 U. S. 296, 307. Here, the statute is a dragnet which can encompass all ideas and views.

The law leaves open the widest conceivable inquiry into ideas and views, the scope of which no one can foresee. The statute fails to give fair notice of what acts and expressions will be punishable. Under the vague and subjective tests of the law, which in its administration envisages a great number of reporters and judges of "subversive", "disloyal", "seditious" and "treasonable" acts and words, the expression of all unpopular or dissentient views becomes dangerous. As many definitions of these words may develop as there are reporters and judges. Inasmuch as we have never been able to arrive at satisfactory definitions, there is good reason to be apprehensive. Mr. Justice Jackson, when Attorney General, correctly summed up the uncertainty and shifting in meaning of the term "subversive" in these words:

> "Activities which seem helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as 'subversive' by those whose property interests might be effected thereby. Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as 'subversive'." (Speech to conference of United States Attorneys, April 1, 1940.)

The law brings within its orbit activity which the Constitution renders inviolate. *Winters* v. *New York*, 333 U. S. 507. It proscribes activity far short of advocacy of violent overthrow of the government. It restricts by its reach the advocacy or discussion of peaceful political, economic and social change. Yet these are lawful activities in which many distinguished Americans have engaged.

In its findings the law states that the dissemination of "subversive" propaganda "may be and frequently is sufficiently subtle to escape detection in the classroom". It mentions the difficulty of measuring the menace of subversive infiltration by conduct in the classroom alone. Together with the loose definition of "subversive", this finding foreshadows a drive on unorthodox political, social and economic views of teachers, both inside and outside the classroom.

The inquiries indicated in the memorandum of the Commissioner of Education are in realms which inevitably invite subjective judgments.

To a marked degree the law approaches the licensing of ideas, since it may result in a situation where no person can teach with a sense of security unless his ideas and associations in his opinion will be palatable to his judge(s). Such censorship does not have its roots in democracy. Democracy is built not on a fixed creed or on a system of regimented ideas but on the sure knowledge that there are no privileged or fixed ideas. The drafters of the law overlooked the fact that teachers enjoy intellectual freedom not for themselves alone but primarily for the sake of the students. The law therefore hurts students since it is certain that teachers will censor their teaching themselves so as to avoid controversial matters and ideas, in spite of the attempt by the Commissioner of Education in his memorandum to prescribe what the teacher

"honestly concerned to help their pupils to become constructive citizens", particularly "teachers of history, civics or government" may properly discuss or teach without violating the statute. Teachers have learned from the history of their profession that in caution there is tenure.

It should be noted that in all likelihood, some non-Communist teachers will leave their profession rather than submit to the policing of their professional and private activities. Submission to such investigation may offend many loyal teachers on the ground that to single out their profession for widespread investigation in itself stigmatizes and discriminates against them. Submission of their private lives to investigation certainly will be irksome to public school employees. John Lord O'Brian noted the effect of such policing in the course of adversely criticizing the federal loyalty program on this ground:

> "What anxieties of mind, what prolonged periods of worry, what restraint upon their initiative, will result from their knowledge that their private lives are being secretly investigated, no one can say. But neither can anyone assert that this shadow upon their activities, however intangible and subtle, will not act as a constraint upon their freedom and their sense of independence." (Loyalty Tests and Guilt by Association, 61 Harv. L. R. 592, 608 (1948).)

In those several regrettable instances in the past when our government has invaded the freedoms of our people in the course of fighting "'seditious activity", we have failed to accomplish our ends and later have admitted our mistakes and have been ashamed of our lapses. Again to impair our freedoms is to court real danger to the democratic American philosophy.

2. The Feinberg Law is in the nature of a bill of attainder and an *ex post facto* law.

The Feinberg Law is *ex post facto* and a bill of attainder. *Garner* v. *Los Angeles*, 341 U. S. 716. There, for the majority, Mr. Justice Clark said that the ordinance under challenge "would be *ex post facto* if it imposed punishment for past conduct lawful at the time it was engaged in" (at 724); and in defining bills of attainder, declared that "punishment is a prerequisite" and "Whether legislative action curtaining a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation'." *Id.* at 722. (Citing *Cummings* v. *Missouri*, 4 Wall 277, 320 (1867).) Application of these definitions here condemns the Feinberg Law.

The Feinberg Law and its complementary regulations permit punishment for past advocacy or associations legal at the time engaged in, which may now be deemed subversive activity, namely, "The writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed by others, all may constitute subversive activity." The Feinberg Law therefore violates the constitutional prohibition against *ex post facto* laws. *Ex parte Garland*, 4 Wall 333.

Proscription by administrative action from the opportunity to follow a chosen profession in government service, without the safeguards of a judicial trial, is punishment constitutionally forbidden as a bill of attainder [*United States* v. *Lovett*, 328 U. S., 303, 316] where it is not based upon "general and prospectively operative standards of qualification or eligibility for public employment" *Garner* v. *Los Angeles*, 341 U. S. at 723. The standards in the case at bar are not merely prospectively operative but retroactive too; moreover they are so vague and uncertain

as to amount to no standards at all in the determination of fitness for public employment.

The statute denies employment to members of ascertainable groups, "the communist party and its affiliated organizations". In the *Lovett* case, the Court stated the rule to be that "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution" (at 315-316). In the *Lovett* case too, it was sought to bar certain so-called "subversives" from public office. The Supreme Court condemned the Congressional enactment as a bill of attainder. See, *Cummings* v. *Missouri*, 4 Wall 277; and *Ex parte Garland*, 4 Wall 333.

Considering all "the circumstances attending and the causes of the deprivation" of the privilege of public school employment [*Garner* v. *Los Angeles*, 341 U. S. at 722], the Feinberg Law amounts to a bill of attainder. Denial of the right to teach in the public schools is *punishment* because removal under the Feinberg Law in the circumstances of our times not only denies a person the right to follow a chosen profession but probably debars such person, in addition, from all other public employment, and the opportunity to engage in private employment. The mode with which such punishment is inflicted, namely by subjective administrative action under vague and uncertain legislative standards emphasizes the attaint here.

3. The Feinberg Law adopts the repugnant principle of guilt by association.

The law makes mere membership in an organization on the proscribed list in and by itself *prima facie* grounds for dismissal. This is contrary to our tradition and law:

"No principle is more firmly embodied in Anglo-American legal tradition than the principle that guilt is personal; no doctrine more odious than the doctrine of guilt by association, unless it is the analogous doctrine of guilt by intention. Those doctrines were the darlings of the Nazi and Fascist states; they are today the effective weapons of every communist state. If we adopt these tyrannical weapons we have in fact succumbed to the philosophy which justifies them and no victory that communism could possibly secure at the polls or elsewhere would be as spectacular as the victory it would thus secure by foisting upon us its odious legal doctrines." (*Henry Steele Commager*, New York Times, Sunday Magazine Section, September 22, 1948, "Should We Outlaw The Communist Party". See *Bridges* v. *Wixon*, 326 U. S. 135, 163; *Kotteakos* v. *United States*, 328 U. S. 750, 772.)

Some of the reasons for rejection of the guilt by association doctrine by Anglo-Americans were well stated by Lord Macaulay more than a century ago (1828) in his essay on Hallam's "Constitutional History" where he made these remarks concerning Queen Elizabeth's action against the Catholics in England in the Sixteenth Century:

"To punish a man because he has committed a crime, or because he is believed, though unjustly, to have committed a crime, is not persecution. To punish a man, because we infer from the nature of some doctrine which he holds, or from the conduct of other persons who hold the same doctrine with him, that he will commit a crime, is persecution, and is, in every case, foolish and wicked * * * (We should not have) accused her government of persecution for passing any law, however severe, against overt acts of sedition. But to argue that, because a man is a Catholic, he must think it right

> to murder a heretical sovereign, and that because he thinks it right he will attempt to do it, and then, to found on this conclusion a law for punishing him as if he had done it, is plain persecution * * *. If, indeed, all men reasoned in the same manner on the same data, and always did what they thought it their duty to do, this mode of dispensing justice might be extremely judicious. But as people who agree about premises often disagree about conclusions, and as no man in the world acts up to his own standard of right, there are two enormous gaps in the logic by which alone penalties for opinions can be defended. * * *. Man, in short, is so inconsistent a creature that it is impossible to reason from his belief to his conduct, or from one part of his belief to another."

In the leading Supreme Court cases in which the doctrine of guilt by association was rejected, the Court held that since guilt is personal the nature of the organization is irrelevant. *De Jonge* v. *Oregon*, 299 U. S. 353; *Schneiderman* v. *United States*, 320 U. S. 118. Here, the legislation seeks to make its finding as to the nature of the organization(s) conclusive without any specific proof, seeks to bar any evidence as to the organization(s) character, and in fact makes the doctrine of guilt by association absolute. In consequence, in order to avoid the stigma of disloyalty, and its disastrous effects, it is to be expected that teachers may avoid any association which purports to deal with political, social, or economic matters. Such would be the better part of wisdom. But it is not to the advantage of their personality or to that of our society.

In the apt words of Mr. Justice Frankfurter in *Garner* v. *Los Angeles*, 341 U. S. 716, 728:

> "The needs of security do not require such curbs on what may well be innocuous feelings and associa-

> tions. Such curbs are indeed self-defeating. They are not merely unjustifiable restraints on individuals. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service."

And just before making these cogent remarks, the same Justice had made the following observations, which are likewise applicable here:

> "Not only does the oath make an irrational demand. It is bound to operate as a real deterrent to people contemplating even innocent associations. How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by 'unlawful means'? All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes. Throughout our history they have been manifested in 'joining'." (at pp. 727-8). See, Sutherland, *British Trials for Disloyal Association During the French Revolution*, 34 Cornell Law Quarterly 303 (1949).

Application of the doctrine of "guilt by association" is a denial of due process of law. Even if the Regents should grant a hearing to a listed organization and prove that it is "subversive", it would still not be a sufficient basis for a finding that any particular teacher who is a member of that organization is "subversive". To go yet

further and to prevent the teacher from showing that the organization is *not* "subversive" is doubly offensive and flagrantly violates due process of law.

In 1920, when political fears and tensions likewise eventuated in repressive measures against freedom of thought and association, Charles Evans Hughes, Morgan J. O'Brien, Louis Marshall, Joseph M. Proskauer and Ogden L. Mills, acting as a Special Committee of the Association of the Bar of the City of New York protested adoption of the doctrine of guilt by association by the New York Assembly in expelling five members of the Socialist Party, declaring that "it is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts * * *" (*Memorial of the Special Committee Appointed by the Association of the Bar of the City of New York*, 5 N. Y. Legis. Doc. No. 30, 143rd Sess. 4 (1920)). The principle they espoused indicts the statute here under consideration.

4. The Feinberg Law is a vague and indefinite statute and therefore incapable of being objectively applied.

The Feinberg Law speaks of "subversive" persons, "subversive" propaganda, and the regents' rules, of "subversive activities." Words like "subversive" and "subversive activities" are so vague as to have a limitless range and variety of meanings for different people. The effect of the law and the regents' rules, therefore, is that no person to whom it applies knows in any real sense what he may or may not do or what he may or may not say, and no person charged with the administration or enforcement of the law and the rules knows precisely to whom and to what it applies. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373.

Statutes and regulations which inflict sanctions under standards so vague and indefinite violate the due process clause (*Cline* v. *Frink Dairy Co.*, 274 U. S. 445), especially when rights guaranteed under the First Amendment are involved (*Winters* v. *New York*, 333 U. S. 507, 509-510; *Stromberg* v. *California*, 283 U. S. 359, 369; *Herndon* v. *Lowry*, 301 U. S. 242, 258; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81). Also see, *Musser* v. *Utah*, 333 U. S. 95.

In none of the foregoing cases was the offense set forth in language as broad, vague and ambiguous as in the Feinberg Law; in each case, the statute made an attempt to set forth with precision what particular conduct or what particular advocacy was forbidden. But here, there is no effort at precision. The law amounts to a dragnet which may enmesh anyone who suggests or discusses a change of government or shows any interest in the form of government of other countries. Its scope is beyond realization. The law and the rules apply not only to the school and the classroom, but to "subversive activity" according to the memorandum of the Commissioner of Education (including "the writing of articles, the distribution of pamphlets, the indorsement of speeches made or articles written or acts performed by others") "outside the school" and not merely "by word of mouth". The teacher therefore must not only be sure that a "suggestion for reform" or the expression of an opinion in the classroom is not "subversive" but he must also be sure that such a suggestion or expression is not "subversive" before he makes it at a social or other gathering or meeting or elsewhere. Such sweeping vagueness and indefiniteness, interfering with freedom of the human mind, are violations of due process of law. (See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, concurring opinion of Douglas, J., at pp. 176-177.)

"No one can tell from the Executive Order what meaning is intended. No one can tell from the records of the cases which one the Attorney General applied. The charge is flexible; it will mean one thing to one officer, another to someone else. It will be given meaning according to the predilections of the prosecutor: 'subversive' to some will be synonymous with 'radical'; 'subversive' to others will be synonymous with 'communist.' It can be expanded to include those who depart from the orthodox party line—to those whose words and actions (though completely loyal) do not conform to the orthodox view on foreign or domestic policy. These flexible standards, which vary with the mood or political philosophy of the prosecutor, are weapons which can be made as sharp or as blunt as the occasion requires. Since they are subject to grave abuse, they have no place in our system of law. When we employ them, we plant within our body politic the virus of the totalitarian ideology which we oppose.

It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of *laws* not of *men*. The powers being used are the powers of government over the reputations and fortunes of citizens. In situations far less severe or important than these a party is told the nature of the charge against him. . . . When the Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path."

5. It creates a new presumption of guilt contrary to constitutional principles.

The Feinberg Law provides that the regents' rules must make "membership in any such organization included in

such listing made by it * * * prima facie evidence of disqualification * * *." *Prima facie* evidence has been defined by the Supreme Court of the United States to be "sufficient evidence to outweigh the presumption of innocence, and if not met by opposing evidence, to support a verdict of guilty." (*Bailey* v. *Alabama*, 219 U. S. 219 at 234.) In the case cited, Mr. Justice Hughes for the Court said further:

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to proscribe" (219 U. S. at 239).

The Feinberg Law, therefore, creates a new and unprecedented presumption—that a teacher, a member of an organization listed by the regents as "subversive" after such hearings as the Board may deem "appropriate", is himself guilty of advocating the overthrow of the government by force, violence or other unlawful means, and such a teacher is then subject to the serious consequences provided in the statute and to the disgrace of dismissal under it. The law, it follows, does not satisfy the requirements for constitutionality of a statutory presumption as set forth by Mr. Justice Hughes in *Bailey* v. *Alabama;* it makes a "purely arbitrary" inference; there is a lack of "rational relation" between the fact of membership and the inferred fact of advocacy of overthrow of the government; it deprives the accused teacher of "a proper opportunity to submit all the facts bearing upon the issue" (*Id.* at 238).

The statutes in existence prior to the enactment of the Feinberg Law, viz., Section 302 of the Education Law and Section 12-a of the Civil Service Law, create no such presumption. Section 3021 of the Education Law provides for removal on the ground of a treasonable or seditious "utterance" or deed by the individual teacher; Section 12-a of the Civil Service Law provides specifically:

> "The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

The opinion of Mr. Justice Hearn here below at Special Term (196 Misc. 873, 881) is noteworthy on the point under discussion:

> "Is there any reasonable connection, under these circumstances, between the fact supposedly 'proved' and the fact presumed? Is it consonant with American traditions of fairness to base on so flimsy a foundation a presumption which establishes the major portion of the case against an accused and casts upon him the burden of disproving substantially what it took the Government eleven months to establish in the recent trial in the United States District Court (Southern District, New York) before Judge Medina in the case of *United States* v. *Foster*?" (*Lederman* v. *Board of Education of City of N. Y.*, 196 Misc., at 881, Sup. Ct., Spec. Term, Kings Co., 1949 [reversed, 276 A. D. 527, 2d Dept., 1950].)
>
> "The cumulative effect of the procedure as outlined then is this: At an 'appropriate' hearing by the Board of Regents (an administrative body)

an organization is found to advocate violent overthrow of the government; a member, as such, of the organization may not be present at this hearing; neither the organization nor a member can review this determination in the courts. A teacher thereafter is charged with membership. At his hearing he is confronted with two onerous presumptions which he must affirmatively meet—presumptions which make out an entire prima facie case against him. They are (1) a presumption of the organization's guilt, based on an administrative board's nonreviewable hearing and finding which was ex parte and hearsay as to the teacher on trial; and (2) a presumption of continuance of past membership rebuttable only by showing its termination 'in good faith'. Then should he be found guilty and discharged, his rights on appeal are ambiguous and essentially inadequate. And the capstone of this jerry-built structure is the finding of guilt from mere membership, without any proof of personal guilt—the teacher's personal nonguilt in fact being irrelevant where the only charge is membership.

"It does not appear to this court that these procedures add up to 'those fundamental requirements of fairness which are of the essence of due process.' (*Morgan* v. *United States*, 304 U. S. 1, 19, *supra*)." (*Id.* at 885.)

6. It will hurt public education through its adverse effect upon freedom of teaching and learning in the public school system.

America has staked a great deal upon the public school system in its effort to preserve a democracy of free men. *Prince* v. *Massachusetts*, 321 U. S. 158, 168. In its plan and operation, the public school is an organization in which democracy should be the pervading influence at every level; the system rests on freedom in administration, teaching

and learning. The Feinberg Law tends to disrupt that system. The search for "subversives" which the statute will sponsor will be concentrated on ferreting out and eliminating "subversive" propaganda, influence, and activities. The entire school system will be involved in the widespread hunt. The cost to public education of this pursuit of "subversive" teachers will be very great, in terms of setbacks in the quality of teaching and learning, without adequate return to the public.

Teachers are bound to be watched, spied on and informed upon, and tried under a variety of standards and definition of "subversive" conduct. They will be spied upon outside of the school as well as within. Principals, teachers, pupils, and parents may turn into informers. School administrators will be converted into special prosecutors of persons suspected of disloyalty, a task for which they have no training. The chase after subversive public school employees, which the statute when applied may inaugurate, is bound to be infinitely more difficult than the detection of improper indoctrinative or other wrongful practices by a teacher or other public school employee whenever they occur, which can be taken care of under the usual supervisory procedure of the school system. The resulting spy apparatus and trial system which the Feinberg Law will bring in practice is a grave threat to the morale of the public school teaching force. In consequence, teaching and learning may retrogress perceptibly. In a democracy dependent for its lifeblood on young persons trained in the public schools to meet all problems, including those which are controversial, this imminent deterioration in the quality of public education may prove to be greater and more lasting in its harm than the Communist threat in the public schools which the Feinberg Law undertook to solve.

Under the law loyalty reports are to be made not once but annually. The standards for determining loyalty are imprecise and necessarily subjective. Since, in the preparation of loyalty reports, conclusions may be based upon private opinions and preconceived judgments of the reporters, there will be opportunity for those who are tempted to exercise their great power to become tyrannical or arbitrary while fear and supineness may develop in wholesale proportions within the ranks of the teachers in order to avoid any conduct which might make them victims of a trial on the stated charge of disloyalty.

The loyalty reports will depend in great part upon information supplied by informers. The danger of proceeding against persons on the basis of information supplied by informers was recently set forth by Mr. Justice Jackson in a relevant discussion on the question of security:

> "Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in the procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected. Cf. Re Oliver, 333 U. S. 257, 268, 92 L. ed. 682, 691, 68 S. Ct. 499." (*United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537.)

Yet proceedings based upon secret reports are to be expected in addition to the cases where persons will be accused of disloyalty by sincere judges mistaking nonconformism or liberalism for subversive conduct.

CONCLUSION

The basic idea of America is a workshop in liberty. It is this idea which pervades the public schools. The Feinberg Law is the very antithesis of this idea. It is not in the tradition of freedom but in the spirit of censorship, repression, thought conformity, and official orthodoxy. It will threaten the public schools of New York and cause serious harm to public education. If the law stands, it will have effects upon other states and other occupations and professions. The net gain to our country will be small at best. On the other hand, the law confers a boon upon the totalitarians it essays to oppose. It makes continuous inroads against the liberties of teachers and other public school employees and it cannot withstand constitutional scrutiny.

Respectfully submitted,

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